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OCTOBER TERM, 1977.

77-990

JOSEPH J.C. DiCARLO AND
RONALD C. MacKENZIE,
PETITIONERS,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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IN THE

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October Term, 1977

No.

JOSEPH J. C. DiCARLO and
RONALD C. MacKENZIE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit.

Joseph J. C. DiCarlo and Ronald C. MacKenzie petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on November 11, 1977.

Opinions Below

As yet unreported, the opinion of the court of appeals is appended, infra at p. 1a.

Jurisdiction

The judgment of the court of appeals was entered on November 11, 1977. The period in which to file this petition was extended by 30 days to and including January 10, 1978. Jurisdiction to review the judgment of the court of appeals is conferred by 28 U.S.C. §1254(1).

Questions Presented

1. This petition presents in the setting of a criminal prosecution the important constitutional question of federalism, for which certiorari was granted in Tenney v. Brandhove, 341 U.S. 367 (1951), but which the Court did not reach there and has not decided in any other case:

To ensure the freedom of state legislatures, which is absolutely essential if states are to remain independent and function autonomously in the federal system, do constitutional requirements of federalism mandate enforcement of a legislative privilege in federal prosecutions against state legislators barring prose-

cutorial use of the defendants' legislative actions and motives?

2. This case also presents the first opportunity for this Court to resolve a sharp conflict in the Circuits on the following question:

Whether the "history and reason" which compelled this Court in Tenney v. Brandhove, 341 U.S. 367 (1951), to enforce a legislative privilege in Civil Rights cases, require enforcement of a federal common law privilege pursuant to Rule 501 of the Federal Rules of Evidence in federal prosecutions against state legislators?

3. Are the reasons for enforcement of a constitutional or common law legislative privilege epitomized by the circumstances of this case, (i) where state legislators are being prosecuted under the expansive Commerce Clause jurisdiction of the Hobbs and Travel Acts for what are essentially federalized state offenses; (ii) where the jury was persuaded to convict on the basis of legislative evidence, which was entirely circumstantial in nature, which concerned the most fundamental legislative functions, and which

was derived solely from facially lawful legislative actions and motives; and (iii) where, to protect legislative freedom, such evidence would be inadmissable in any state prosecution for virtually identical offenses, and in any state or federal prosecution against a member of Congress?

Constitutional and Statutory Provisions Involved

The Tenth Amendment to the Constitution provides:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article XXI of the Massachusetts Constitution provides:

> "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any court or place whatsoever."

Rule 501 of the Federal Rules of Evidence provides:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Statement of the Case

Petitioners were jointly tried and convicted by a jury on an eight-count indictment charging conspiracy and substantive violations of the Hobbs and Travel Acts.[1] These offenses were alleged

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[1] 18 U.S.C. §§1951 and 1952. The Travel Act counts specified and incorporated the state offenses of extortion and bribery as defined in Mass. Gen. Laws c. 268A §2.

to have been committed between February, 1971 and July, 1972, during which period both petitioners were members of the Massachusetts Senate. The essence of the charges against petitioners is that they planned and executed a scheme to extort money from a New York consulting firm, McKee-Berger-Mansueto, Inc. (MBM).

MBM's specialty is construction management, which involves acting as a property owner's agent to monitor performance by independent construction contractors. In December, 1969, the Massachusetts Bureau of Building Construction awarded MBM a multi-million dollar contract to perform its construction management services in overseeing construction of the University of Massachusetts campus in Boston. From the outset the contract was politically controversial, since it was perceived as duplicating services the Bureau itself was created and financed to perform. In early February, 1971, newspaper articles in the Boston and suburban press began publicizing this criticism and raising other questions about MBM's performance, the manner in which it had obtained the contract, and the open-ended

nature of the contract terms regarding MBM's profit.

On February 11, 1971, DiCarlo and two other members of the Massachusetts legislature filed a bill for an order creating a special joint House and Senate committee to investigate MBM's contract. In April, 1971, the legislature voted to create the committee, appointing DiCarlo its co-chairman.

The prosecution sought to prove that petitioners extorted money from MBM by creating or exploiting its fear that the committee's investigation would result in an unfavorable report, jeopardizing its contract and financial position generally. MBM's president, Gerald McKee, was the prosecution's chief witness. McKee testified that as the investigation proceeded, he became convinced DiCarlo was unfairly changing its focus, greatly increasing the likelihood of an unfavorable outcome and, according to the prosecution, the pressure on MBM to pay petitioners for a favorable outcome.

McKee believed the issues under investigation were those narrowly relating

to the contract terms governing MBM's profit margin, and to the adequacy of its performance. The record shows that MBM's executives and lawyers had prepared a thorough response on these issues, and were confident in the merits of their position. McKee was quite displeased when he realized that DiCarlo's concern was not with the merits of the particular contract or MBM's performance, but rather with the broader political implications of a state agency hiring private consultants to perform services the agency was being financed and staffed to perform.[2] If that were made the controlling issue, McKee felt the fate of MBM's contract was subject to the prevailing political winds, upon which the merits of the particular contract would have little or no impact. Thus, as McKee testified, upon discerning from the "nature" of DiCarlo's questioning during the committe's July 29, 1971 public hearing "that the issues -- I [McKee] thought the investigation was to deal with -- had not been. . .dealt with" (R. 262),

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[2] DiCarlo's interest was apparently whetted by the fact that the agency head, who had approved the MBM contract, was a political rival. Infra at 2a.

his fear of a report recommending termination of the MBM contract intensified.[3] At this point, McKee directed William Harding, an MBM employee, and its courier for "hundreds" of political "contributions" across the country (R. 911), to contact MacKenzie.

Harding and MacKenzie met several times in September, 1971. During the first meeting Harding asked MacKenzie to ascertain whether the committees' report would be unfavorable to MBM. At the second meeting, after MacKenzie said he had read the draft report and it "didn't appear too damaging" (R. 811, 894), Harding requested an opportunity for McKee to see for himself. At the third meeting, MacKenzie advised Harding that a copy of the draft would be made available to McKee. Harding then raised the question

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[3] "R." designations refer to the Joint Record Appendix filed in the court below. See also R. 264.

As McKee recalled, his questioning by DiCarlo "related primarily to the need for a public agency to employ construction management. . ." (R. 260).

of what if parts of the report were unfavorable and MBM wanted some changes (R. 811-12, 881). Harding testified that MacKenzie's response was that "it might take a considerable contribution" (R. 812). Harding pressed for an amount, and MacKenzie allegedly replied, "possibly $30,000 or $40,000" (Ibid).

McKee testified that he agreed to pay MacKenzie the $40,000. Payments were made directly to MacKenzie in five installments, the first in October, 1971, and the last being delivered on May 12, 1972. Eleven days later, as the prosecution emphasized to the jury, the Massachusetts legislature voted to adopt the committee report, which contained no recommendation for further legislative action.

There is no evidence in the record that in his conversations with Harding, MacKenzie said or implied the money was for anyone other than himself. Nor is there evidence of DiCarlo ever soliciting or receiving money from MBM for any reason.

The prosecution's main effort in the case was to prove that DiCarlo was

actually the silent principal behind MacKenzie. The proof it offered consisted of two types: non-legislative evidence, regarding which no claim of legislative privilege was relevant; and evidence of DiCarlo's legislative actions and motives, which was admitted in volumes over his continuing claim of privilege.

Based on its assessment of the record, the court below concluded that there was sufficient non-legislative evidence to establish a prima facie case of DiCarlo's involvement. McKee had testified that in July, 1972, subsequent to his final payment and the report's adoption by the legislature, DiCarlo and MacKenzie paid an unexpected visit to MBM's New York office. At that time, as the court below summarized, "DiCarlo lectured McKee severely about the delayed payments, telling him he had to share them with others, and said he would like to help MBM in the future, but in that event McKee would have to 'play ball,' and not get behind." See infra 4a.

But, as the court below immediately acknowledged, "McKee's credibility,"

principally his assertion and account of the July, 1972 meeting, was strenously attacked by the defense, and emerged as the main jury question in the case. In fact, the trial court charged the jury that the occurrence and substance of the July, 1972 meeting was the first question they should resolve, and if they did not find beyond a reasonable doubt that the meeting took place, it was their last question as far as DiCarlo was concerned, for they should then acquit him.[4] The trial court stressed to the jury, however, that in making this decision they could refer to DiCarlo's legislative actions and motives for any corroborative inferences they might find in that evidence. And, as the court below found, the prosecution was "aided" and "strengthened" considerably by such evidence in its effort to move the case from the point of prima facie proof to the point of convincing the jury, beyond a reasonable doubt, that McKee was telling the truth, that the July, 1972

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[4] See infra 2a, n. 6.

meeting took place, and ultimately, that DiCarlo was guilty. See infra at 5a, 6a.

The legislative evidence introduced against DiCarlo to buttress McKee's testimony consumed a substantial majority of the more than two weeks the prosecution took to present its case-in-chief. But, the nature and use of such evidence is certainly as important as its pervasive presence before the jury.

The court below characterized the legislative evidence as "probative" (infra at 5a), concluding that its "purport. . .was to establish a connection, and an illegitimate one, between McKee, MacKenzie, and DiCarlo." See infra 4a. To the extent that the court is suggesting that the legislative evidence concerned legislative actions that were themselves criminal in character or bore unmistakable markings of being in furtherance of a criminal enterprise, such a suggestion is untenable. The evidence involved was not, for example, that DiCarlo solicited money from MBM during a committee hearing; but rather it was evidence of

entirely lawful legislative actions, involving the most fundamental legislative functions of sponsoring and voting for legislation, directing a committee investigation, questioning witnesses at a legislative hearing, and preparing a committee report. There is no suspect or intrinsically guilty "purport" or "probative" quality to this evidence. This is clear from the following brief summary of the legislative evidence:[5]

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[5] While some of this evidence involves MacKenzie acting as a legislative aide to DiCarlo, the bulk of it related strictly to DiCarlo's legislative actions and motives. But according to the trial court's instructions to the jury, the nature of the case presented by the government dictated that MacKenzie's conviction depends upon DiCarlo's. Because it rejected DiCarlo's claim of legislative privilege, the court below did not reach the question of MacKenzie's conviction. Should this Court grant review, MacKenzie will demonstrate that his conviction cannot stand if DiCarlo's is reversed.

1. Preparation of the Committee Report: By far the most crucial legislative evidence used by the prosecution concerned preparation of the committee report. The prosecution offered literally volumes of testimony and documentary evidence to establish that DiCarlo controlled preparation of the report, and, that in performance of the alleged pay-off arrangement, DiCarlo inserted, under the title "Conclusions," material authored by but not attributed to McKee. Through a host of legislative, FBI and MBM witnesses, the prosecution attempted to erase any and all doubt regarding the origins of the "Conclusions" section, how and why it was inserted in the report, and that it was irregular in form, content and placement; in short, that it was the product of a pay-off.[6] The prosecutor

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[6] The prosecutor marshalled this evidence for the jury:

> "I submit, ladies and gentlemen, for your rational conclusion that that particular document was delivered to Senator MacKenzie and that it got in the report through his relations with Senator DiCarlo

(cont.)

summed up the import of this evidence as being "total and complete evidence of his [DiCarlo's] collusion with Senator MacKenzie" (R. 1847).

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6 (cont. from page 15)

because MacKenzie was not a member of this Committee, had no legitimate access to the Committee.

* * *

. . .McKee's language is not in this report by accident. It's in here by design, but it's in here as Mr. Kenneally [a member of the committee] said, who was presented the report, which he signed, by Senator DiCarlo, and it's in there by subterfuge, because it's not identified as anything that came from Mr. McKee, and it's a subterfuge in the sense that it's a fraud on the members of that Committee, perpetrated on them by the person who put it in there, and I suggest it was Senator DiCarlo, because it's represented to be their conclusions, and it is not.

* * *

It's not a conclusion, Mr. Pidgeon [Senate Parliamentarian] said in all reports conclusions do not follow recommendations, they don't logically, and they didn't in any other Senate report, as he described them, but "Conclusions" is on here. It's not a conclusion about anything." (R. 1846-1847)

2. The Revere Meeting: After learning that DiCarlo and two other legislators were sponsoring a bill to create a special committee to investigate MBM's contract, McKee and his attorney, former Governor Peabody, arranged a meeting with DiCarlo to present MBM's reasons as to why the proposed investigation was unnecessary. The meeting took place on February 18, 1971, at DiCarlo's home in Revere, Massachusetts. In an attempt to convince DiCarlo that MBM's profit was reasonable and controlled, McKee proceeded with a detailed explanation of the contract terms. DiCarlo apparently responded by stating that his interest in pursuing the investigation was political, and not in the merits of MBM's contract. The prosecution urged the jury to infer from DiCarlo's statements an intention to threaten McKee and set him up for an extortionate demand (R. 226, 228, 1289).

3. DiCarlo's Position on the Committee: DiCarlo's role in securing creation of the investigative committee was fully documented for the jury. Through testimony of other committee members

regarding the inner workings of the committee, including DiCarlo's statements during its preliminary executive sessions, the jury's attention was directed to the fact of DiCarlo's powerful "position as the senior and influential senator" on the committee (6 Tr. 185),[7] "becom[ing], in effect, the organizer and operating chairman of this particular committee... conduct[ing] its hearings under his jurisdiction" (R. 1279). The prosecution urged the jury to infer from DiCarlo's leadership role on the committee that he was using his power to hang an "investigative knife" over MBM's head to pressure its submission to the extortionate demand (R. 1834-35).

4. DiCarlo's Questioning of McKee at the Committee's Public Hearing: McKee testified that DiCarlo's interrogation of him at the July 29, 1971 public hearing served to confirm and intensify all his fears about DiCarlo's true motives in pursuing the investigation. Not only

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[7] "Tr." designations refer to the volume and pagination of the original trial transcript.

did the nature of the questions demonstrate DiCarlo's antagonism toward hiring private consultants performing state functions, which was a political issue and not related to the merits of MBM's contract, but DiCarlo's tone represented the fulfillment of the senator's warning at the close of the Revere meeting of being a tough investigator (R. 211). In a further effort to prove that DiCarlo was pursuing the investigation for illegitimate reasons, the prosecution showed that while accusations of impropriety in the contract award to and performance by MBM were the main impetus for initiating a legislative investigation, those subjects were not touched by DiCarlo; the "major thrust" of his questioning, as McKee stressed to the jury, related to the necessity for such contracts, a criticism McKee felt unable to defend against (R. 258-261; 6 Tr. 125-126). The prosecution urged the jury to infer from the nature and tone of DiCarlo's questioning in the committee hearing that his purpose was to intimidate McKee in furtherance of the extortionate scheme (R. 257-261; 6 Tr. 181).

5. Legislative Processing of the Committee Report: The legislative record of the report's processing from completed draft through filing with the Clerk of the House of Representatives to its final adoption in May, 1972, was reviewed at length and in detail before the jury. As the court below summarized, "it was shown, over DiCarlo's objection, that the legislative course of the order [to adopt the report], good and bad from the standpoint of MBM, coincided with MBM's performance, or non-performance, of its undertaking" to pay the $40,000. Infra at 4a. The prosecution urged the jury to infer from the correlation between MBMs' payments and the progress of the report toward final adoption by the legislature, that DiCarlo was exercising his legislative powers in furtherance of the extortionate scheme (R. 348-349).

It may be that those who believe it more than a myth that politics has no place in legislative action will find DiCarlo's expressed motives in pursuing the investigation distasteful. It may also be that some of DiCarlo's legislative actions were irregular or unprecedented. But, DiCarlo's legislative actions and motives in sponsoring the investigation order, chairing the committee, interrogating witnesses at the public hearing, preparing the committee report, and guiding the order to adopt the report through the legislative process, were actions at the core of DiCarlo's legislative functions, and were, on their face, indisputably lawful.

Reasons for Granting the Writ

A. Introduction

This case squarely presents a timely opportunity for the Court to settle questions of great importance in the sensitive area of federal-state relations.

The court below issues a blanket authorization for federal prosecutors and juries in Hobbs and Travel Act cases against State legislators to draw inferences of guilt from their facially lawful and unquestionably fundamental legislative actions. The federal prosecutorial power unleashed by this decision poses a real and grave danger to the freedom of State legislatures, and, ulti-

mately to State automony and independence in the federal system. While the court below fully acknowledges existence of this danger, it concludes that nothing in the Constitution or federal common law of evidence prevents this price from being exacted to satisfy "the government's need of evidence of federal crime." Infra at 8a.

The ruling below is premised on a destructive concept of federal supremacy, which has been rejected by this Court. Moreover, the decision's restrictive interpretation and application of Rule 501 of the Federal Rules of Evidence to a claim of legislative privilege by a defendant State legislator is untenable and stands in direct conflict with the ruling of the Court of Appeals for the Third Circuit in In re Grand Jury Proceedings, 563 F.2d 577 (1977). Because of its impact on the freedom of State legislatures and thus on the constitutional balance of federal-state power, its unsupported character, and its conflict with the Third Circuit ruling, the decision below warrants review by this

Court.[8]

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[8] This case is a particularly appropriate vehicle for deciding the questions presented. There is no impediment of prematurity, waiver or failure to preserve rights as there was in United States v. Craig, 537 F.2d 957 (7th Cir. 1976), cert. denied sub nom. Markert v. United States, 425 U.S. 973.

Moreover, this case arises at a time when Hobbs and Travel Act prosecutions against State legislators are rapidly increasing. See Ruff, Federal Prosecutions of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo.L.J. 1171, 1172 and n. 1.

Finally, the flow of cases to this Court raising these issues of legislative privilege have been artificially restricted by what appears to be a government policy not to appeal decisions enforcing the privilege. Thus, no appeal was taken by the government from the trial court's enforcement of the privilege against certain categories of legislative evidence in In re Grand Jury Proceedings, supra. In United States v. Crillock, ___ F.Supp. ___ (W.D.Tenn. 1976) the federal prosecutor expressly advised the trial court that he would not appeal its enforcement of the legislative privilege.

B. The Constitutional Requirements of Federalism Mandate, in Hobbs and Travel Act Prosecutions Against State Legislators, Enforcement of a Legislative Evidentiary Privilege.

In Tenney v. Brandhove, 341 U.S. 376, the Court granted certiorari to decide the same question of "constitutional power to limit the freedom of state legislators" presented by this case. Tenney did not reach the constitutional question because the Court refused to assume that in enacting the Civil Rights Act of 1871, "Congress -- itself a staunch advocate of legislative freedom -- would impinge a tradition so well grounded in history and reason" as the privilege against "judicial inquiry into motives of legislators." 341 U.S. 376, 377.

The constitutional question posed in Tenney, and as yet unanswered by this Court, is of even greater significance in the context of federal criminal prosecutions, especially under the Hobbs and Travel Acts. In the first place, the constricting effect on legislative freedom that results from speculation as to the motives behind legislative action by

prosecutors and juries is magnified enormously where the consequence may be criminal conviction, carrying the penalties of imprisonment and political ruin. See United States v. Johnson, 383 U.S. 169, 181-182; Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-503. Second, the constitutional requirements of federalism impose far more stringent limitations on Congress' power under the Commerce Clause, which is the predicate for the Hobbs and Travel Acts, than on its power under §5 of the Fourteenth Amendment to enact civil rights laws. Compare National League of Cities v. Usery, 426 U.S. 833 with Fizpatrick v. Bitzer, 427 U.S. 445. See also Developments -- Section 1983 and Federalism, 90 Harv.L.Rev. 1133, 1175-1190.

In National League of Cities v. Usery, supra, the Court reaffirmed the principle that the "federal system of government embodied in the Constitution" bars Congress from exercising Commerce Clause power "in a fashion that would impair the States'. . .freedom to structure integral operations in areas of traditional governmental functions."

426 U.S. at 852.[9] That principle governs this case. Congress exceeds its constitutional power in abrogating the protections erected by the State to safeguard the freedom of its legislature, since that freedom is essential to the autonomous functioning of the State in the federal system.

In structuring their government, the people of Massachusetts determined that the freedom of its legislature was "so essential to the rights of the people" that they adopted a constitutional privilege precluding use of legislative action as "the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." See Article XXI of the Massachusetts Constitution; Coffin v. Coffin, 4 Mass 1, 28

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9 It also appears that autonomy of state judicial and administrative agencies has prompted this Court to limit exercise of federal judicial power under guidelines of "federalism," which are designed to maintain a viable "federal system." See Rizzo v. Goode, 423 U.S. 362; Hoffman v. Pursue, 420 U.S. 592; Francis v. Henderson, 425 U.S. 536; Younger v. Harris, 401 U.S. 37.

(the privilege was established to secure the "public good. . .[through] the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions").[10] Use of legislative evidence by federal prosecutors, juries and courts is no less threatening to State legislative freedom than the use of such evidence by corresponding State agencies. See Tenney v. Brandhove, supra; cf. United States v. Johnson, supra at 182; In re Grand Jury Proceedings, 563 F.2d 577 (3rd Cir. 1977). Not only does federal prosecutorial use of such evidence displace and override the State's decision to protect the freedom of its legislature, but in jeopardizing the independence of the State legislature, these prosecutions undermine the independence and autonomy of the State. See Ex parte Virginia, 100 U.S. 339, 362 (1879)(Mr.

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10 The Massachusetts privilege was the template for the Speech or Debate Clause, and the Coffin decision has frequently been employed by this Court in construing the scope of that Clause. See e.g., Tenney v. Brandhove, supra at 373.

Justice Field dissenting).[11]

The court below denied that the constitutional requirements of federalism provided the basis for a legislative privilege in any degree. The court noted that the Constitution expressly grants a legislative privilege in the Speech or Debate Clause, but only to members of Congress. But the absence of an express protection for this aspect of State

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[11] As Justice Field stated: "Congress could not undertake to prescribe the duties of a State legislature and the rules it should follow, and the motives by which it should be governed, and authorize criminal prosecutions against the members if its directions were disregarded; for the independence of the legislature is essential to the independence and autonomy of the State." Ibid.

The majority of the Court agreed that Jusice Field was completely accurate in his interpretation of the Constitution generally, but found that §5 of the Fourteenth Amendment was an exception. "[T]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." Id. at 347-348.

sovereignty is not dispositive. Cf. United States v. Nixon, 418 U.S. 683, 705 n. 16. National League of Cities makes clear that an exercise of Commerce Clause power affecting any aspect of State sovereignty must be assessed under the "constitutional policy [expressly declared by the Tenth Amendment] that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 426 U.S. at 843, quoting from Fry v. United States, 421 U.S. 542, 547 n. 7. Moreover, in United States v. Nixon, supra, the Court derived a privilege of confidentiality of Presidential communications from the even less explicit source of the separation of powers doctrine, which establishes "the supremacy of each branch within its own assigned area of constitutional duties." 418 U.S. at 705. Likewise, the privilege protecting the "freedom of state legislators acting within their traditional sphere" derives from the sovereign status of the State in the constitutional scheme for the federal system. See Tenney v. Brandhove, supra at 376.

The court below implicitly raises three additional objections to the constitutional predicate for the privilege. The first of these objections is that the separation of powers doctrine does not apply when a State legislator is being prosecuted under a federal criminal statute. See infra 9a. This objection is without relevance. The "central purpose" of the legislative privilege is to protect the independence of legislators. See Eastland v. United States Servicemen's Fund, 421 U.S. 491, 510-511. While the freedom guaranteed members of Congress by the Speech or Debate Clause serves to insulate Congress from political coercion by the executive and judicial branches, thereby reinforcing its position as a co-equal branch, see United States v. Brewster, 408 U.S. 501, 508, this is but one of its benefits and not a definition of its scope. The Clause, for example, operates as a prophylactic rule, regardless of the motives for the federal prosecution. But more importantly, the Clause fully protects Congressional freedom even where the separation of powers interest is not implicated at all. Thus, members of Congress have a transactional

form of immunity against private civil suits. See e.g., Dombrowski v. Eastland, 387 U.S. 82, 84-85 (members of Congress "should be protected not only from the consequences of litigation's results, but also from the burden of defending themselves"). And, at the least, the Clause provides members of Congress with an evidentiary privilege in State prosecutions. Cf. United States v. Brewster, supra. State legislative freedom requires comparable protection.[12]

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[12] Thus, the Speech or Debate Clause provides no evidence that a constitutional privilege exists only where the separation of powers interest is present.

It is fair to say that the Framers were intent on preserving the sovereignty of both the States and the federal government. "[T]he preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. . . the Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States." Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869).

The absence of an express state privilege could not reasonably support the assumption that it was rejected by the Founders, who must include not only those who

Second, and related, is the objection that cases like this one arise "in an area of federal supremacy." Infra 8a. But this begs the question, since it incorrectly presumes the absence or subservience of federalism limitations on federal power.

The third objection rests on the dictum in O'Shea v. Littleton, 414 U.S. 488, 503 (1974), to the effect that, as distinct from rulings on immunity

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12 (cont. from page 31)
drafted the Constitution, but also all those State legislators who voted to adopt it. Given their apprehensions about granting dominant power to the federal government, it is inconceivable that the Founders, particularly the State legislators, intended to relinquish the privilege so necessary for legislative freedom that they agreed to grant it to members of Congress. More likely, the framers believed the present state of sweeping federal criminal jurisdiction, as exemplified by the Hobbs and Travel Acts, most improbable. See United States v. Bass, 404 U.S. 336, 349-350.

from civil liability, "we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights." This statement has no relevance here. The Court's focus in O'Shea was clearly on 18 U.S.C. §242, which provides criminal penalties for civil rights violations. This statute is predicated on §5 of the Fourteenth Amendment, a provision which sanctions extraordinary intrusions "into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." Fitzpatrick v. Bitzer, supra at 455. Moreover, petitioners make no claim that a State legislator's criminal conduct is immunized from prosecution. What is asserted here is an evidentiary privilege for State legislators, like that afforded members of Congress. This privilege places no obstacle in the way of prosecuting the legislator for any criminal conduct. It merely "preclud[es] any showing of how he acted, voted or decided." United States v. Brewster, supra at 527.

C. "History and Reason," As Demonstrated in Tenney, Require Enforcement of a Legislative Evidentiary Privilege Under Rule 501 of the Federal Rules of Evidence.

In In re Grand Jury Proceedings, supra at 583, the Third Circuit ruled that the "principles of common law in light of reason and experience dictate the recognition of a federal common law legislative privilege to be applied in federal criminal prosecutions." Drawing from this Court's analysis in Tenney, demonstrating that legislative freedom requires protection of legislators "from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense," the Third Circuit concluded:

> "[T]he privilege is needed to protect the great majority of legislators who are conscientious in the performance of their duties... Their work could be substantially hindered by exposing members to litigation arising out of the performance of legislative duties. Recognition of this fact led the Supreme Court to grant official immunity for federal civil suits, Tenney v. Brandhove, supra. That same concern in common law history supports the existence of a

> privilege for state legislators in federal criminal proceedings. Principles of federal-state comity -- 'a proper respect for state functions,'. . . -- reinforce this conclusion." 563 F.2d at 583.

The court restricted the privilege to precluding only "evidence of his action performed in a strictly legislative capacity, motivations for such action, or utterances in the course of his legislative duties." 563 F.2d 585.

The decision below stands in direct conflict with the Third Circuit ruling. In rejecting a common law legislative privilege the court proceeds from the erroneous premise (infra 7a) that Rule 501 permits recognition only of those privileges preexisting the Rule's adoption. In federal criminal cases Rule 501 incorporates the standards of Rule 26, F.R.Cr.P., which authorized common law development of new or more expansive evidentiary privilges on a case by case basis. See Weinstein's Evidence, 501-2 501-11, 501-24.

Regarding the particular privilege asserted in this case, the court below

relied on this Court's statement in Gravel v. United States, 408 U.S. 606, 627, "that official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress.'" This reliance is misplaced. Legislative immunity is transactional and absolute in nature, and extends far beyond the privilege applicable in criminal cases to anything done or said within the "sphere of legitimate legislative activity." See Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501; Dombrowski v. Eastland, 387 U.S. 82, 84-85; Tenney v. Brandhove, supra. The legislator is immune from civil liability regardless of the fact that the wrongful act can be proven by non-legislative evidence. Compare United States v. Brewster, supra with Dombrowksi v. Eastland, supra; and Kilbourn v. Thompson, 103 U.S. 168 (1881). Immunity from criminal prosecution is not claimed by petitioners. As the Third Circuit found, the legislative privilege in criminal cases merely precludes use of a narrow class of evidence, thus striking a balance sensitive to the needs of both legislative freedom and law enforcement. In re Grand Jury Proceedings, supra at

584. Contrary to the understanding of the court below (infra 8a), this Court's decision in United States v. Brewster, supra was not indifferent to the needs of legislative freedom, but rather struck precisely the same balance as the Third Circuit did.

In his dissent from the Third Circuit decision, Judge Gibbons focuses on the statement in the majority opinion that the privilege would exclude "an admission of criminal complicity by a legislator during a debate." 563 F.2d at 584. Judge Gibbons concluded that the "incremental increase in freedom of legislative expression" resulting from such an application of the privilege was not worth the loss of the "incriminating statements." 563 F.2d at 587. This point, however, relates to the scope of the privilege, not its existence. The admission of criminal guilt need not be shielded any more than the agreement to take a bribe. See United States v. Brewster, supra. But, to reject the privilege entirely, ignores the fact, amply demonstrated by the record in this case, that crucial evidence against a State legislator can be marshalled from

legislative actions of the most fundamental kind, which are unquestionably lawful on their face. Indeed, this prosecution might well have been pressed even without evidence of the July, 1972 meeting. DiCarlo's candid statement of political interest at the Revere meeting[13] and his use of MBM material in the report without attribution, could be enough to trigger a prosecution, from which few could survive politically even if acquitted. Given the "hazard of a judgment against them based upon a jury

13 The court below concluded that the Revere meeting was not a legislative action within the scope of the privilege, because of DiCarlo's motives for holding it. But, it is the nature of the act, not the motive for it, that determines application of the privilege. See United States v. Brewster, supra at 514-515; and generally Gravel v. United States, supra at 616. If it were otherwise, the privilege would be self-defeating, since motive is precisely what it shields from judicial inquiry. United States v. Johnson, supra at 180.

speculation as to motives," Tenney v. Brandhove, supra at 377, particularly where, as in the Revere meeting, political maneuvering and self-interest are revealed, it cannot be doubted that many legislators will be deterred from engaging in wholly lawful legislative activity. See United States v. Brewster, supra at 555-560 (Mr. Justice White dissenting). The consequence of authorizing federal prosecutors and juries to infer guilt from facially lawful legislative action and motives, will be to place a federal straight-jacket on the procedures and processes of State legislators. Such a power of control cannot be permitted to exist in a federal system, where the State "is itself a coordinate element in the system established by the framers for governing our federal union." National League of Cities v. Usery, 96 S.S.Ct. at 2473.

Conclusion

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

United States Court of Appeals
For the First Circuit

No. 77-1165

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOSEPH J. C. DiCARLO,

DEFENDANT, APPELLANT.

No. 77-1166

UNITED STATES OF AMERICA,

APPELLEE,

v.

RONALD C. MacKENZIE,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. WALTER JAY SKINNER, *U. S. District Judge.*)

Before COFFIN, *Chief Judge,*
ALDRICH, *Circuit Judge,*
and CRARY,* *District Judge.*

Francis J. DiMento and *Earle C. Cooley* with whom *DiMento & Sullivan, Hale and Dorr, David Rosenberg,* and *Rosenberg, Baker & Fine* were on brief, for appellants.

Edward J. Lee, First Assistant United States Attorney, with whom *Edward F. Harrington,* United States Attorney, and *Alan D. Rose,* Assistant United States Attorney, were on brief, for appellee.

November 11, 1977

ALDRICH, *Senior Circuit Judge.* Defendants DiCarlo and MacKenzie, former members of the Massachusetts Senate,

*Of the Central District of California, sitting by designation.

appeal from convictions following verdicts of guilty on an indictment charging conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, extortion affecting interstate commerce, (Count I), and the Travel Act, 18 U.S.C. § 1952, use of facilities of interstate commerce in connection with an unlawful activity, (Count II), and six counts charging the substantive offenses. The evidence justified the verdicts. DiCarlo's principal complaint is that the convictions violated his legislative privilege; MacKenzie's is that his conviction depends upon DiCarlo's, a matter we do not reach.

The evidence warranted the following findings. The Commonwealth having undertaken an extensive project to construct a new campus for the University of Massachusetts at Columbia Point in Boston, the New York firm of McKee-Berger-Mansueto, Inc. (MBM) was employed, after public advertising, to be construction manager. In February, 1971, while it was engaged in this activity, a series of newspaper articles, under the by-line of a State House reporter, were published about the contract of a highly critical and, MBM thought, inaccurate, nature. Before the completion of the four-day series, a legislative order was filed, co-sponsored and signed by DiCarlo and two others, calling for an investigation and report. McKee and MBM's Massachusetts attorney, former Governor Peabody, prepared a rebuttal letter to all three, and personally took one to DiCarlo's home in Revere.

DiCarlo's response was that he was not interested in the merits of the contract, but was very much interested in doing harm to a political rival who, as Commissioner of Administration and Finance, had approved the contract, adding that he should not have had this meeting and would deny having had it. Shocked by this, as well as by DiCarlo's telling McKee that he was naive about political life in Boston, McKee and his associate Mansueto decided that the latter should consult Senator Kelly, an unindicted co-

conspirator, then Chairman of the Senate Ways and Means Committee, who had once introduced Mansueto to DiCarlo. Mansueto met with Kelly, and the latter volunteered that he could get someone better than Peabody to represent him. Asked how he knew about Peabody, Kelly said he knew of the Revere meeting. Peabody had been visible, but McKee was surprised to learn that Kelly knew of a private meeting that DiCarlo had said should not have taken place. Kelly further said that if Mansueto would meet him the following month, when both were going to be in Florida, he might be able to help.

When that second meeting took place, the order was before Kelly's committee. Kelly informed Mansueto that he had talked with DiCarlo; that the latter was out to get his rival, but that he needed money, and that $100,000 to DiCarlo would take care of the matter. Mansueto reported this to McKee, and they decided it was blackmail by DiCarlo, and that they would not go along, even though they now feared the investigation would be "basically phony and unfair." A week later Kelly's committee recommended that the order be adopted. Finding a lack of sufficient proof that Kelly had spoken with DiCarlo's authorization, the court limited the testimony regarding Kelly to McKee's and Mansueto's state of mind.

A legislative committee was appointed to carry out the investigation order, with DiCarlo as its Senate chairman. A public hearing was held, and McKee submitted a brief, but views were expressed at the hearing that were hostile to MBM, and McKee feared that his contract was in danger. He thereupon had an employee, one Harding, meet with defendant MacKenzie. Harding reported that MacKenzie told him that a good committee report would cost $30-$40,000. By this time McKee was convinced that the contract was in serious trouble, and he and Mansueto decided they must pay. In a series of five payments, $40,000 was paid to MacKenzie, assertedly for DiCarlo.

The payments were made over a period of time. During this interval McKee was shown a copy of the draft report, and found it not satisfactory. He dictated a memorandum, and sent it to MacKenzie, via Harding. When the report was filed, most of McKee's language was in it, under the heading "Conclusions." The entire report was traced to the typewriter used by DiCarlo's secretary, and all other members of the committee denied authorship. There was evidence that the Conclusions section was, though in the opinion of these members correct, out of place in the report if from an outside source without attribution. The purport, and intended effect, of course, of this evidence was to establish a connection, and an illegitimate one, between McKee, MacKenzie, and DiCarlo.

The schedule of payments had not been timely maintained, which resulted in considerable personal friction with MacKenzie. Of greater importance, it was shown, over DiCarlo's objection,[1] that the legislative course of the order, good and bad from the standpoint of MBM, coincided with MBM's performance, or non-performance, of its undertaking, again to show the illegitimate connection. To complete the picture, eleven days after the final payment was made, the report was filed, containing McKee's language and recommending nothing adverse to MBM.

Some weeks later, DiCarlo and MacKenzie arrived, unexpectedly, at McKee's office in New York. DiCarlo lectured McKee severely about the delayed payments, telling him he had to share them with others, and said he would like to help MBM in the future, but in that event McKee would have to "play ball," and not get behind.

No purpose would be served by detailing, or characterizing, the defense testimony, except to say that some was unimpressive, and none sufficient to suggest that the ver-

[1] DiCarlo preserved a continuing objection based on legislative privilege. MacKenzie did not.

dicts were inadequately supported. DiCarlo's basic defense, accordingly, must be that the objected-to evidence against him, although probative, should have been excluded.

In order to set the stage for the claim of legislative privilege, defendants' brief commences with a statement,

> "The charges against DiCarlo were based on his participation in the 1971 Massachusetts legislative committee investigation of a multi-million dollar consultant contract awarded by the state to . . . 'MBM' for overseeing construction . . . at Columbia Point, Boston. Essentially, DiCarlo was tried on the theory that he took certain legislative actions . . . for the corrupt and extortionate purpose of frightening . . . MBM" [rather than for a "legitimate legislative purpose."]

We observe, at the outset, that defendants' second sentence would seem to qualify the apparent meaning of the first. But, in any event, the charges against DiCarlo were not "based" on his legislative conduct, but on his conduct outside of the legislature, committing or threatening an offense abusing the legislative function, *cf. United States v. Brewster*, 1972, 408 U.S. 501, and using the facilities of interstate commerce. Nor was the case "tried on the theory that he took certain legislative actions." The government's proof, however, was, indeed, aided by reference to legislative acts.

A prima facie case against DiCarlo was sufficiently established by McKee's testimony of the July post-report meeting in New York.[2] However, McKee's credibility, even

[2] In light of this evidence, as well as the testimony as to the Revere meeting, neither of which were subject to any legislative privilege, post, were there one, defendants' motion to dismiss was properly denied. The Revere meeting scarcely met the claim in DiCarlo's brief of being a discharge of his "fact-gathering responsibilities," when DiCarlo disclaimed interest in the facts and turned to telling McKee he would find "what a tough adversary he could be."

though reinforced by Harding and another, was attacked, and the government's position was strengthened by the evidence which clearly traced the report's "Conclusions" to McKee's authorship, and by the legislative course which coincided with McKee's varying responses, via MacKenzie, to his claimed undertaking. Essentially, DiCarlo maintains that, as a state legislator, he had an immunity comparable to that conferred upon members of Congress by the "Speech or Debate" clause in the United States Constitution.

The "Speech or Debate" clause does not apply, or purport to apply, to state legislators. *United States* v. *Craig*, 7 Cir., *en banc*, 1976, 537 F.2d 957, *cert. denied sub nom. Markert* v. *United States*, 425 U.S. 973; *In re: Grand Jury Proceedings*, 3 Cir, 1977, F.2d.[3] However, it furnishes a place of beginning. The clause reads as follows.

> "The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place." U.S. Const. Art. I, §6.

Like much other Constitutional language, this has been found to say a great deal in very little, and at the same time its meaning has yet to be fully explored. At the one end of the spectrum, no civil or criminal action will lie for whatever a legislator says on the floor. *United States* v. *Johnson*, 1966, 383 U.S. 169; *Cochran* v. *Couzens*, D.C. Cir., 1930, 42 F.2d 783, *cert. denied*. 282 U.S. 874. At the other end, although no such case has come to our attention, if a legislator claims he was in Chicago at a certain moment, it should be open to show that he was in the Capitol making an address. Wherever the line may be, it is not, of course, limited to actions on the floor. If this immunity were applicable here, it might be difficult to make any reference to the origin of the report's Conclusion, even for the limited purpose of showing DiCarlo's connection with MacKenzie and McKee. *Cf. Gravel* v. *United States*, 1972, 408 U.S. 606. *See*, in general, *United States* v. *Brewster*, ante. We are concerned, however, only with the privilege or immunity that attaches to public officials in respect to their official acts.

[3] One member of the en banc court in *Craig* felt that constitutional relationships require the federal courts to respect a state's Speech or Debate clause, and a majority of the Third Circuit panel reached an equivalent result.

We mention first a misconception. Defendants seek the "establishment of a legislative privilege under [Federal Evidence] Rule 501."[4] To the extent that a privilege exists, it antedated the rule, and was neither created, nor enlarged, by the rule. The effect of a substantive immunity may be to bar evidentiary use of the particular act, but the rule merely applies the immunity, rather than establishes it.

The doctrine of official immunity is well recognized, as is the fact that its extent varies, depending upon the office of the individual and the circumstances under which he seeks it. *Barr* v. *Mateo*, 1959, 360 U.S. 564. Unquestionably it applies, and is to be applied by the federal courts, to state legislators. *Tenney* v. *Brandhove*, 1951, 341 U.S. 367. Unlike the constitutional immunity, the privilege is basically judicially created, as *Barr* v. *Mateo* points out, and the Court has denied its application to criminal responsibility. *See Imbler* v. *Pachtman*, 1976, 424 U.S. 409, 428-29; *O'Shea* v. *Littleton*, 1974, 414 U.S. 488, 503. *Gravel* v. *United States*, ante, at 627. These cases make inapplicable the approach in *Brandhove*, where the Court in a suit under the Civil Rights Act, found Congress did not intend thereby to impair the privilege. Here, in the face of these cases, we are

[4] ". . . the privilege of a witness . . . shall be governed by principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." (1975).

asked to extend it.[5] Particularly we believe it should not be extended when the crime itself was entirely outside of any legislative act, and the conduct assertedly immunized was introduced for its corroborative evidentiary effect.[6] *Cf. Clark* v. *United States,* 1933, 289 U.S. 1, 16; *United States* v. *Manton,* 2 Cir., 1938, 107 F.2d 834 (judge indicted for receipt of bribes did not even question evidence showing his opinions favored bribers).

Defendants contend, nevertheless, that concepts of federalism require special protection to state legislators, so not to "lay bare to assault and destruction legislative freedom and independence in its entirety." A similar spectre did not deter the Court in *United States* v. *Brewster,* ante, at 521-24. Moreover, while the Court was there concerned with a constitutional provision designed to preserve an equality, we are here dealing with an asserted common law privilege in an area of federal supremacy. We find nothing to persuade us that the federal-state relationship overrides the government's need of evidence of federal crime. *Cf. United States* v. *Nixon,* 1974, 418 U.S. 683, 710, 712-13.

After defendants' brief was filed, the Third Circuit decided *In re: Grand Jury Proceedings,* ante, with a majority opinion containing extensive dicta favoring defendants' position. The court recognized that *O'Shea* "makes clear [that] official immunity applies only in civil cases," and

[5] We consider it to be reading too much into the Court's language in *United States* v. *Johnson,* ante, at 180, that in *Brandhove* the Court "viewed the state legislative privilege as being on a parity with the similar federal privilege," to say it meant that the state privilege is on a full parity with that of Congress. We read *Brandhove* as merely saying that the state privilege, like the federal privilege, is not destroyed by a claim of malice. If the *Johnson* language meant more than this, it is dictum that stands alone.

[6] That the case against DiCarlo was not established by the legislative acts was made clear by DiCarlo's counsel informing the jury that the court would instruct it that DiCarlo could not be found guilty unless "you . . . believe that the July 6, 1972 talk took place," and the court's acceptance in its charge.

quoted *Gravel,* that official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress," adding that "separation of powers . . . does not apply when a state legislator is being prosecuted under a federal criminal statute," and that "[w]e perceive no limitation on the grant of powers to require immunization of [state] legislative members of enforcement from federal criminal statutes." Nevertheless, relying on *Tenney* v. *Brandhove,* although noting it involved only civil immunity, the court concluded that "principles of common law in light of reason and experience dictate the recognition of a federal common law legislative privilege to be applied in federal criminal prosecutions." We join in Judge Gibbons' disagreement. If there is "no limitation on . . . enforcement," we see no basis for creating a limitation that handicaps proof. *United States* v. *Craig,* ante.

We turn to defendants' objection to the court's allowing the jury to consider the testimony regarding Kelly's demands, though not evidence that DiCarlo had in fact authorized such speaking in his name, as evidence bearing on McKee's and Mansueto's state of mind, viz., as making them apprehensive, or, as the government put it, softened up for DiCarlo's demand. Although we can understand the court's caution, we think any error was in defendants' favor, viz., in denying the jury the right to tie Kelly and DiCarlo together, if they believed this testimony. If DiCarlo considered that the Revere meeting should not have taken place, and should remain secret, one must wonder what motive would have caused him to disclose it to Kelly. Conversely, although this was not a necessary conclusion, if Kelly was operating on his own, to elect to speak in DiCarlo's name might be expected to lead to complications. The jury might also consider Kelly's position as chairman of the Senate Ways and Means Committee that had to approve the order. In these circumstances it would not seem a far leap for the jury to think of Kelly as a

referred-to member of the club when they were considering McKee's testimony that DiCarlo had told him he had been obliged to share the $40,000 with "others." In such event, testimony regarding Kelly's conduct would be admissible against defendants for all purposes.

But even if finding Kelly a co-conspirator should be thought unwarranted, it is not necessary that the fear with which the statute is concerned be caused by the defendant; it is enough that he improperly took advantage of fear induced by others. *United States* v. *Hathaway,* 1 Cir., 1976, 434 F.2d 386, *cert. denied,* 429 U.S. 819; *United States* v. *Crowley,* 7 Cir., 1974, 504 F.2d 992; *United States* v. *Hyde,* 5 Cir., 1971, 448 F.2d 815, 845, *cert. denied,* 404 U.S. 1058. The court charged the jury that the defendant must know of the fear. The evidence amply warranted such an inference. DiCarlo's lesson on the alleged political facts of life in Boston could be taken as a thinly veiled reference to pay-offs, and it could hardly be thought that DiCarlo was the only prospective payee, or that he believed he was the only one who might seek to be such. The jury could well conclude that DiCarlo knew that MBM's vulnerability, as the butt of the newspaper articles and the legislative order, might well cause others to prey upon, and hence increase, McKee's apprehensions.

It is true that the overtones of the Kelly evidence, if DiCarlo's name was unauthorizedly used, could have a prejudicial effect. This was for the district court to weigh. However the matter be viewed, we see no abuse of discretion.

Defendants' other contentions call for no comment. The judgments are affirmed, except to the extent that the district court proposed to modify one as to each defendant if the appeals failed, and for this purpose the case will be remanded.